Supreme Court, U.S.
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In The

Supreme Court of the United States

PARADISE VALLEY UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

LINDA JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Ninth Circuit err in holding (in conflict with the decisions of the other Circuits) that mere knowledge of an employee's physical impairment – which impairment does not substantially limit any major life activity – and evidence of statements made by the employee are sufficient for a jury to decide that the employer "regarded" the employee as disabled under the Americans with Disabilities Act?

2. Did the Ninth Circuit err in holding (in conflict with the decisions of this Court and the other Circuits) that the law as characterized in the parties' jury instructions governs when deciding a motion for judgment as a matter of law, even if the jury instructions are an incomplete or incorrect statement of law?

RULE 29.6 LISTING

Petitioner Paradise Valley Unified School District is a municipal corporation and a political subdivision of the State of Arizona. It has no parent company or subsidiary.

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PETITION FOR WRIT OF CERTIORARI

The Paradise Valley Unified School District ("School District") respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 251 F.3d 1222. The opinion of the district court (App., *infra*, 18a-34a) is unreported.

JURISDICTION

The Ninth Circuit entered its judgment and opinion on May 24, 2001. The Ninth Circuit denied a timely petition for rehearing on June 19, 2001. (App., *infra*, 35a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Americans with Disabilities Act of 1990 ("ADA"), § 3, 42 U.S.C. § 12102(2)(A) and (C):

> The term "disability" means, with respect to an individual

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; [or]

. . . .

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

A. Essential Facts.

Petitioner School District employed Respondent, Linda Johnson, from August 1982 through May 1996. For approximately the last nine years of her employment with the School District, Johnson worked as a groundskeeper.

In June 1995, Johnson injured her leg in a work-related accident. The injury required surgery to repair damaged nerve tissue and connective tissue. Her doctor released her to return to work two months later, in September 1995.

Johnson worked full time and without restrictions from September through December, 1995. However, her doctor placed her on "no-work" status in December 1995 because of some residual pain and swelling from her injury. When Johnson provided her doctor's note to the School District's Director of Employment, Dr. Teri Traaen, Johnson described how the accident happened and the nature of the injuries to her leg. Johnson also told Dr. Traaen: "I didn't know if and when I'd ever be able to come back to work." (Supp. Excerpts of Record 191 at p.

35). Johnson was wearing shorts at the time she met with Dr. Traaen, so it is possible that Dr. Traaen could have observed the injured leg.

Approximately two months later, on February 5, 1996, Johnson obtained a doctor's note releasing her to return to work, but with significant limitations. Specifically, the limited release precluded Johnson from engaging in prolonged standing or walking, and required her to change positions frequently. Johnson claims Dr. Traaen looked at the doctor's note and told her the School District did not accept limited releases. Johnson remained on no-work status.

On May 13, 1996, Dr. Traaen met with Johnson and told her that because she had far exceeded 100 days of absences that year and still had not been released to return to her full duties, her options were either to resign her position or be terminated. Johnson asked that she be granted an additional one-year leave of absence. She also asked to be allowed to use up her remaining sick and vacation days before having to choose between resignation and termination. Dr. Traaen denied both these requests.

Johnson testified that she told Dr. Traaen during this meeting that she was in constant pain and that "I don't know how I can ever work again." Dr. Traaen acknowledged that Johnson did look like she was in constant pain and that her residual difficulty was "genuine."

Johnson also testified that during this meeting, Dr. Traaen advised her that "a resignation would look better on an application, when and if I did get a full release to come back to work." (Supp. Excerpts of Record 191 at p.

38). Dr. Traaen also stated, "Maybe you'll get a release, and you can apply for another job," and offered to provide Johnson with a letter of recommendation to assist her to get a new job. (*Id.* at p. 39).

The next day, May 14, 1996, Johnson submitted her letter of resignation to Dr. Traaen. Johnson admits that after Dr. Traaen received the resignation, Dr. Traaen again offered to provide Johnson with a letter of recommendation.

Three weeks later, on June 3, 1996, Johnson's doctor provided her with an unrestricted medical release. On July 10, 1996, Johnson applied for an open groundskeeper position with the School District, but was not hired. A district administrator marked that application (and twelve more applications Johnson submitted over the next several months) as "do not process." Dr. Traaen testified that Johnson's applications were so marked because Johnson had a chronic attendance problem and performance issues throughout her fourteen years of employment with the School District. (Supp. Excerpts of Record 205 at pp. 40-41).

Johnson admitted at trial that she has never considered herself to be disabled, and that "there is no medical evidence that would even remotely suggest that [she was] anything close to disabled." (Supp. Excerpts of Record 188 at p. 71). Dr. Traaen similarly testified at trial that she did not regard Johnson as being disabled. (*Id.* 189 at p. 149).

B. Proceedings Below.

1. District Court.

Johnson filed suit against the School District in federal district court for the District of Arizona, claiming the School District discriminated against her on the basis of her disability by: not allowing her to return to work with a limited release; not allowing her to use sick and vacation time to cover her absence; constructively terminating her employment; and refusing to rehire her. The School District filed a motion for summary judgment contending that Johnson was not disabled and therefore not entitled to the protections of the ADA.

The trial court granted the School District's motion in part. It held that Johnson did not, as a matter of law, suffer from an impairment that substantially limited her in any major life activity. However, the trial court also found that there were genuine issues of fact as to whether the School District regarded Johnson as disabled.

Johnson's "regarded as" claim was tried to a jury, which rendered a verdict in favor of Johnson. The School District filed a motion for judgment as a matter of law, arguing that Johnson offered no evidence that the School District regarded her as disabled. The School District alternatively moved for a new trial.

The trial court granted the School District's motion for judgment as a matter of law, holding that "[r]easonable people could not find the evidence adequate to support the finding that Traaen regarded Johnson as disabled within the meaning of the ADA." (App., *infra*, 31a-32a). The district court specifically noted that a disability with

respect to the major life activity of working requires significant restrictions in the ability to perform an entire class or broad range of jobs, and not just the inability to perform one particular job. (App., *infra*, 22a-23a). The district court also conditionally granted the motion for new trial (in the event the judgment as a matter of law were overturned on appeal).

2. Court of Appeals.

Johnson appealed the judgment in favor of the School District to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the grant of judgment as a matter of law, holding that Johnson had offered sufficient evidence that the School District took adverse employment actions against Johnson because it regarded her as disabled. In reaching this conclusion, the Ninth Circuit erroneously believed it was required to apply an incomplete definition of "disability" from the jury instructions, rather than the correct legal standard.

The Ninth Circuit also reversed the conditional grant of a new trial because it believed the district court applied the wrong standard. Specifically, the Ninth Circuit held that the district court "never determined that the jury's contrary view was 'against the *great* weight of the evidence or *seriously* erroneous.' " (App., *infra*, 17a). The Ninth Circuit further stated – without explanation – that even if the district court had applied the correct standard, it would have been an abuse of discretion to hold that the standard was met. (App., *infra*, 17a).

REASONS FOR GRANTING THE PETITION

This case arises out of the ADA's provision which extends its protections beyond those individuals who actually have "a physical or mental impairment that substantially limits one or more major life activities" to those who are merely "regarded as having such an impairment." 42 U.S.C. § 12102(2)(A) and (C). Review is appropriate because the Ninth Circuit's published opinion is contrary to this Court's decisions, creates a split with the other Circuits and involves important issues of law.

I. The Ninth Circuit's Opinion Is Contrary to this Court's Decisions.

To state a "regarded as" claim under the ADA, it is not enough for the plaintiff to demonstrate her employer believed she had a physical or mental impairment. Instead, this Court has made it clear that a plaintiff must prove that the employer believed she had an impairment that **substantially limits a major life activity**. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490, 119 S. Ct. 2139, 2150 (1999) ("An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity."). Moreover, "[w]hen the major life activity under consideration is that of working, the statutory phrase 'substantially limits' requires, at a minimum, that plaintiffs allege they are unable to work in a broad class of jobs." *Id.* at 491, 119 S. Ct. at 2151.

In this case, the Ninth Circuit acknowledged the correctness of these legal standards. However, it erroneously refused to apply these correct legal principles because, according to the Ninth Circuit, they were not fully "spell[ed] out" in the parties' stipulated jury instructions. (App., *infra*, 8a-9a, n.3). The Ninth Circuit's reliance on the jury instructions rather than the correct legal standards is directly contrary to this Court's prior decisions.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988), this Court rejected the very conclusion the Ninth Circuit reached in this case. The petitioner in *Boyle* had won a jury verdict and then successfully opposed the respondent's motion for judgment notwithstanding the verdict.[1] However, the court of appeals reversed, holding that the respondent was entitled to judgment as a matter of law.

In this Court, the petitioner argued that the court of appeals had erred because the formulation of the defense on which the court of appeals had relied differed from the district court's instructions to the jury. Rejecting that argument, this Court held:

> If the evidence presented in the first trial would not suffice, as a matter of law, to support a jury verdict under the properly formulated defense, judgment could properly be entered for the respondent at once, without a new trial. And that is so even though (as petitioner claims)

---

[1] Pursuant to the 1991 amendments to Rule 50, Fed. R. Civ. P., motions for judgment notwithstanding the verdict are now called motions for judgment as a matter of law.

> respondent failed to object to jury instructions that express the defense differently, and in a fashion that would support a verdict.

Id. at 513-14, 108 S. Ct. at 2519 (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 118-20, 108 S. Ct. 915, 918 (1988) ("Although the same legal issue was raised both by those motions and by the jury instructions, the failure to object to an instruction does not render the instruction the law of the case for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict.")).

Following this Court's lead, the other Circuits have also rejected the position the Ninth Circuit erroneously adopted in this case. For example, in *Geldermann, Inc. v. Financial Management Consultants, Inc.*, 27 F.3d 307, 313 (7th Cir. 1994), the court stated that "where the reviewing court is determining whether a trial court has erred in denying a motion for directed verdict or a j.n.o.v. motion, it is the law which properly applies and not the law that the trial court announces to be appropriate in its jury instructions that govern." *See also Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 975 n.5 (Fed. Cir. 1995) ("The general rule is that in reviewing the law on a properly laid and renewed motion for JMOL, the appellate court is not bound by the instructions given the jury, even if they were not objected to."), *aff'd* 517 U.S. 370, 116 S. Ct. 1384 (1996); 9A C. Wright & A. Miller, *Federal Practice and Procedure* § 2537 at pp. 348-49 (2d ed. 1995) ("The failure of a party to object to the jury instructions does not make them the law of the case so as to preclude the entry of judgment as a matter of law if it is required by law.").

Significantly, the Ninth Circuit's insistence in this case on applying the incomplete or incorrect statement of law in the jury instructions is contrary to its own prior decisions. The Ninth Circuit has stated:

> Where a party contests on appeal the district court's ruling on a motion for directed verdict, however, the party's assignment of error is the ruling on the motion for directed verdict, not the subsequent jury instruction. This is just another way of saying that the motion for directed verdict, although sometimes overlapping with the points of law reflected in the jury instructions, is distinct. The inquiry, therefore, focuses on the propriety of granting the motion for directed verdict, which depends upon the sufficiency of the evidence up to that point in the trial; the jury instructions on the points of law contained in the motion for directed verdict are simply outside the scope of that analysis.

Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 183 (9th Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990).

Accordingly, because the Ninth Circuit's opinion is contrary to this Court's decisions, decisions of the other Circuits and even the Ninth Circuit's own precedent, review should be granted.

II. The Ninth Circuit's Opinion Creates a Split with the Other Circuits.

Review of this case is also warranted because the Ninth Circuit's opinion creates a split with the other Circuits. Prior to trial, the district court ruled as a matter

of law that Johnson's physical impairment did **not** substantially limit any major life activity. Johnson did not challenge that determination on appeal to the Ninth Circuit. Thus, the only issue before the Ninth Circuit was whether the School District took adverse employment action against Johnson because it mistakenly regarded her as having something she in fact did not have – an impairment that substantially limits a major life activity.

The only evidence Johnson offered in support of her "regarded as" claim was evidence demonstrating the School District was aware of Johnson's impairment and evidence of comments by Johnson herself in which she wondered "if and when [she would] ever be able to come back to work." The Ninth Circuit reversed the grant of judgment as a matter of law because it held that such evidence was sufficient to permit a jury to find that the School District regarded Johnson as having an impairment which substantially limited a major life activity.

The other Circuits that have considered this issue have uniformly held that such evidence is, as a matter of law, insufficient to state a "regarded as" claim under the ADA. For example, the Fifth Circuit affirmed the grant of a motion for judgment as a matter of law in *Burch v. Coca-Cola Co.*, 119 F.3d 305 (5th Cir. 1997), *cert. denied*, 522 U.S. 1084 (1998). It held:

> Coca-Cola unquestionably considered Burch to be an alcohol abuser and concedes that alcohol consumption may have induced the conduct for which it claimed Burch was fired. Burch's testimony, and that of Dr. Nace, would also support a jury finding that Coca-Cola regarded Burch as suffering from alcoholism, as that condition was

> defined at trial. But . . . we do find the evidence insufficient to support a finding that Coca-Cola regarded Burch as anything other than what he actually was: an alcoholic whose alcoholism did not substantially impair any major life activity of working. . . . Burch produced no evidence that Coca-Cola regarded him to be so limited. . . . The record is silent as to any conception, or misconception, held by Coca-Cola that alcoholism, alone, renders an alcoholic employee substantially impaired.

Id. at 322-23.

The same is true in this case. It is undisputed that Johnson's impairment does **not** substantially limit any major life activity. Evidence that the School District was aware of that impairment and even evidence that Johnson herself was concerned about the effects of her impairment on her ability to work is not evidence of what the School District believed. Inferences about the School District's beliefs from such limited evidence necessarily involves improper conjecture and speculation.

Numerous other cases from the other Circuits also demonstrate the Ninth Circuit's error. For example, the Sixth Circuit has held that supervisors' knowledge of an employee's impairments, and even their knowledge that the employee suspected she had multiple sclerosis was insufficient as a matter of law to state a "regarded as" claim. *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 885 (6th Cir. 1996); *see also Santiago Clemente v. Executive Airlines, Inc.*, 213 F.3d 25, 33-34 (1st Cir. 2000) (evidence that employer was aware of both the plaintiff's ear problems and the employer-appointed doctor's statement that

the plaintiff "may not be able to fly again" was insufficient to support a "regarded as" claim); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144, 153-54 (2nd Cir. 1998) ("the mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate either that the employer regarded the employee as disabled or that that perception caused the adverse employment action"); *Kelly v. Drexel University*, 94 F.3d 102, 109 (3rd Cir. 1996) (same); *Plant v. Morton International, Inc.*, 212 F.3d 929, 938 (6th Cir. 2000) (plaintiff cannot state a "regarded as" claim "merely by pointing to that portion of the record in which his supervisor admitted that he was aware of Plant's medical restrictions and modified Plant's responsibilities based on them"); *Amadio v. Ford Motor Co.*, 238 F.3d 919, 927 (7th Cir. 2001) ("It is important to note that, in order to establish a 'regarded as' claim, it is not enough for a plaintiff to show that the employer knew of the plaintiff's impairment. The plaintiff must also show that the employer believed that one or more of the plaintiff's major life activities were substantially limited by the plaintiff's impairment."); *Moore v. J.B. Hunt Transport, Inc.*, 221 F.3d 944, 954 (7th Cir. 2000) (court refused to "assume a perception of disability" based on employer's decision to terminate and its awareness of impairment, stating: "Even if the employer had fired the plaintiff because of his injury, he would not necessarily have a claim under the ADA. The Act is not a general protection of medically afflicted persons."); *Taylor v. Nimock's Oil Co.*, 214 F.3d 957, 961 (8th Cir. 2000) ("We conclude that knowing that an employee may be having medical difficulties and expressing concern, whether through an offer of medical leave or, as here, sending a

'get well' card, does not amount to treating an employee as if she has permanent disability that substantially li nits her life activities."); *Sutton v. Lader*, 185 F.3d 1203, 1209 (11th Cir. 1999) ("The mere fact that an employer is aware of an employee's impairment is insufficient to demonstrate that the employer regarded the employee as disabled.").

Accordingly, the Ninth Circuit's decision in this case conflicts with the law in other Circuits. Review is warranted to resolve this split in the Circuits.

III. The Questions Presented Are Important.

The issues raised in this petition are important far beyond the scope of this particular case, and they beg for this Court's guidance. In *Sutton*, this Court acknowledged the ADA presents "some conceptual difficulty," particularly when defining "disability" in terms of substantially limiting the major life activity of "working." 527 U.S. at 492, 119 S. Ct. at 2151. The Ninth Circuit further acknowledged that such "mind-bending problems are exacerbated where, as here, the claim is not that the plaintiff *is* disabled from working, but that she is wrongly *regarded as* disabled from working:"

> Does that mean that the employer must subjectively believe that the plaintiff cannot work at a class or broad range of jobs? Why would an employer ordinarily form any view on whether an employee is disabled from performing jobs for other employers? Are we therefore to concern ourselves only with the question whether, if the employee was as impaired as the employer thought, she would, as an objective

matter, be unable to perform a class or broad range of jobs?

(App., *infra*, 8a-9a, n.3).

Such difficult questions arise in almost every "regarded as" claim asserted under the ADA. Litigants, lawyers and the lower courts will benefit from this Court's clarification of these difficult "regarded as" issues.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA JOHNSON,

Plaintiff-Appellant,

v.

PARADISE VALLEY UNIFIED SCHOOL DISTRICT,

Defendant-Appellee.

No. 99-17530

D.C. No. CV-97-00823-JWS

OPINION

Appeal from the United States District Court for the District of Arizona John W. Sedwick, District Judge, Presiding

Argued and Submitted
November 15, 2000 – San Francisco, California

Filed May 24, 2001

Before: Alex Kozinski, Michael Daly Hawkins, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Berzon

COUNSEL

Rosemary Cook, Phoenix, Arizona, for the plaintiff-appellant.

Gary L. Lassen and Kimberly J. Cilke, Jennings, Strouss & Salmon, Phoenix, Arizona, for the defendant-appellee.

OPINION

BERZON, Circuit Judge:

After prevailing in a jury trial on her claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101-12213, against Paradise Valley School District ("District"), Linda Johnson appeals from the district court's order granting judgment as a matter of law to the District and conditionally granting the District's motion for a new trial. We reverse.

BACKGROUND

A. The Evidence Favorable to Johnson

The jury heard the following evidence at trial, some of which was contradicted by other evidence and some of which was not:

Linda Johnson was employed by the District from August 1982 to May 1996. From her date of hire to July 27, 1987, Johnson held the position of Custodian I. She was promoted to Groundskeeper I and served in that capacity from July 27, 1987 to April 13, 1989. Johnson was then promoted to Groundskeeper II, a position she held until her resignation on May 14, 1996.

Johnson was severely injured on the job on July 9, 1995. A golf cart crushed Johnson's leg, and she suffered a "degloving" injury – that is, an injury in which skin, muscle, and nerve tissue on the leg were pulled away from the bone. Johnson underwent surgery to repair the damaged nerve tissue, connective tissue, and skin, and was able to return to work from September 1995 to December 1995. In December, Johnson's doctor placed her

on "no work" status because she was suffering persistent pain and swelling in her injured leg.

Johnson thereupon met with the District's Director of Employment, Dr. Teri Traaen, and presented her with her doctor's note. Johnson's leg injury was visible during this meeting because Johnson was wearing shorts. Johnson described the injury to Traaen, telling her that: "the electric cart crushed my leg and tore the skin, muscle, and all the tissue off my leg. I [am] on crutches . . . to keep weight off my foot because it was swelling." Johnson told Traaen that she was in constant pain, and that due to her injury, she did not know "if and when" she would ever be able to return to work.

Traaen testified at trial that Johnson "truly did look like she was in constant pain," that Johnson had indicated that she did not know if she could ever work again, and that Traaen had no reason to doubt Johnson's statement regarding her future work prospects.

On February 5, 1996, Johnson received a release from her doctor that allowed her to return to work with the following restrictions: "No prolonged standing, no prolonged walking, allow frequent changes in position." Johnson met with Traaen and gave her the limited release. Johnson testified that Traaen told her that she could not return to work under the limited release, because "we don't take limited releases." Traaen denied ever having told any employees, including Johnson, that they would be terminated if they could not obtain a full release, but the jury heard from two other District employees, Dan Gallagher and Jay Brewer, each of whom testified that they had suffered injuries, and that Traaen

had refused to permit them to return to work with limited releases and told them that unless they could obtain full releases they would be terminated.

District policy permitted Johnson 100 days of unpaid leave, commencing after her last day of work. On May 13, 1996, after Johnson's 100 days had expired, Johnson met with Traaen and Eileen Holusha, the benefits administrator for the District, and, according to Johnson, was told that she had to choose between resigning or being fired. At that time, Johnson testified, she asked for a one-year leave of absence to recuperate from her injury, or, in the alternative, for permission to use her approximately 23 days of unused vacation and sick leave to defer her date of decision in hope of obtaining a full release from her doctor. Although District policy dictated that the latter request should have been granted, Traaen denied both requests and encouraged Johnson to resign, suggesting that a resignation might look better on her resume than a termination. Traaen stated that if Johnson obtained a full release after resigning, she could apply for another job, and offered to write a recommendation letter for Johnson if she resigned.

Three witnesses corroborated Johnson's story. All three testified that Johnson had tearfully told them on May 13, 1996, that she had just spoken with Traaen and had been told that she had to resign or be fired.

The day after the May 13, 1996 meeting, Johnson submitted a letter of resignation. Three weeks later, on June 3, 1996, Johnson received a full release from her doctor. On July 10, 1996, Johnson applied for an open position of Groundskeeper I and was not hired. In the

succeeding several months, Johnson applied for 12 more open positions and was not interviewed or hired for any of them. Each of Johnson's applications was marked "DNP," an acronym for "do not process," by a District administrator.

Traaen testified that she was involved in the decision to mark Johnson's applications DNP, and that they were so marked because of an incident in which Johnson came to Traaen's office angry over not being hired for a position (the "rage incident"), and because Johnson had had attendance problems during her fourteen years with the district.

Johnson's account of her meeting with Traaen on the day of the alleged rage incident was very different from Traaen's. Johnson testified that she went to meet Traaen, waited for about 90 minutes in the reception area, and was then called into Traaen's office and left alone for several minutes. When Traaen returned, according to Johnson, she told Johnson, "This meeting is over. Leave." Johnson left. Moreover, Traaen conceded on cross-examination that the rage incident postdated Johnson's first application, which, like the later ones, was marked DNP. Traaen also conceded that Johnson had never been disciplined for her attendance "problems," and that her performance evaluations were uniformly positive in all categories other than attendance. The jury also saw Johnson's fourteen annual performance evaluation forms, which revealed that the attendance issue was discussed on the two evaluations immediately preceding Johnson's two promotions, in 1987 and 1989.

B. Proceedings below

Johnson filed this ADA case in February 1997, alleging that the District discriminated against her because she was disabled, in violation of 42 U.S.C. § 12102(2)(A), and because the District regarded her as disabled, in violation of 42 U.S.C. § 12102(2)(C).[1] District Judge Bruce M. Van Sickle granted summary judgment on Johnson's § 12102(2)(A) claim, finding that Johnson did not, as a matter of law, suffer from a physical impairment that substantially limited her in any major life activity. Judge Van Sickle denied the District's motion for summary judgment as to the § 12102(2)(C) claim, however, finding that there was sufficient evidence to proceed to trial on Johnson's claim that the District discriminated against her because it regarded her as disabled. This claim was tried to a jury before Judge Van Sickle in February 1999.

At trial, Johnson challenged four distinct adverse actions by the District, all of which, she alleged, had occurred because the District regarded her as disabled: the refusal to allow Johnson to return to work without a full release; her forced resignation; the refusal to allow

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[1] The ADA prohibits employers from discriminating "against a qualified individual with a disability because of" that disability. 42 U.S.C. § 12112(a). A "qualified individual with a disability" is a person "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). A person has a "disability" within the meaning of the ADA if she "(A) [has] a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) [has] a record of such an impairment; or (C) [is] regarded as having such an impairment." 42 U.S.C. §§ 12102(2)(A)-(C).

her to extend her leave of absence by using her accumulated vacation and sick time, in alleged violation of District policy; and the failure to consider her subsequent applications for open positions.

At the close of plaintiff's case, the District moved for judgment as a matter of law, arguing that Johnson had introduced no evidence in support of her claim that the District regarded her as disabled. Judge Van Sickle denied the motion. After deliberation, the jury returned a verdict in Johnson's favor and awarded her $237,345.

After the verdict, the District filed a renewed motion for judgment as a matter of law.[2] Judge Van Sickle thereupon determined that he was unable to continue to preside over the case, and the case was reassigned to a different district judge, Judge John W. Sedwick. Judge Sedwick proceeded to hear, and then granted, the District's renewed motion for judgment as a matter of law, and also heard and conditionally granted the District's alternative motion for a new trial. Johnson appeals Judge Sedwick's grant of judgment as a matter of law on her "regarded as disabled" claim, arguing that there was sufficient evidence for the jury to conclude that the District regarded her as disabled, and his conditional grant of a new trial, arguing that Judge Sedwick abused his discretion because the jury's verdict was not against the overwhelming weight of the evidence. We agree on both issues.

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[2] The District's motion was based on the contention that Johnson had not introduced evidence that the District regarded her as disabled. Accordingly, our discussion is confined to the evidence on this point.

DISCUSSION

A. Legal framework

"There are two apparent ways in which individuals may fall within [the "regarded as disabled" provision of the ADA]: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton v. United Air Lines*, 527 U.S. 471, 489 (1999). Here, Johnson's claim was that the District regarded her as disabled from the major life activities of walking, working, or standing.[3]

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[3] Where the major life activity in question is working, to establish that she was "regarded as disabled" an employee must show that her employer wrongly believed that she possessed an impairment or degree of impairment that, if she actually was so impaired, would qualify her as disabled from working under the objective definition of "disability" contained in § 12102(2)(A). *See Deppe v. United Airlines, Inc.*, 217 F.3d 1262, 1265 (9th Cir. 2000) ("In 'regarded as' cases, the employer must perceive the individual as having an actual disability under the ADA."); *see also* 29 C.F.R. § 1630.2(j)(3)(i) (stating that to show a substantial limitation in the major life activity of working, an employee must show that she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes").

As the Supreme Court has noted, to recognize "working" as a major life activity raises various logical conundra. *Sutton*, 527 U.S. at 492. The mind-bending problems are exacerbated where, as here, the claim is not that the plaintiff *is* disabled from working, but that she is wrongly *regarded as* disabled from working: Does that mean that the employer must

B. Sufficiency of the evidence

Viewing the evidence in the light most favorable to Johnson, *Ace v. Aetna Life Ins. Co.*, 139 F.3d 1241, 1246 (9th Cir. 1998), and reviewing *de novo* the district court's grant of the motion for judgment as a matter of law, *Gilbrook v. City of Westminster*, 177 F.3d 839, 864 (9th Cir. 1999), we hold that the evidence was quite sufficient to support the jury's verdict.

In granting the District's motion for judgment as a matter of law, the district court summarized the evidence discussed above and explicitly recognized that "standing in isolation [the evidence before the jury] might be said to support an inference that Traaen believed Johnson was disabled within the meaning of the ADA." Nonetheless,

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subjectively believe that the plaintiff cannot work at a class or broad range of jobs? Why would an employer ordinarily form any view on whether an employee is disabled from performing jobs for other employers? Are we therefore to concern ourselves only with the question whether, if the employee was as impaired as the employer thought, she would, as an objective matter, be unable to perform a class or broad range of jobs? Neither *Deppe* nor any other case of this court resolves these confounding issues.

For purposes of this case, though, we can leave these puzzles aside. The District stipulated to jury instructions that define "substantially limited," with respect to working and all other major life activities, in general terms, and did not spell out the "class of jobs or broad range of jobs" requirement. The District has therefore failed to preserve any issue concerning the application of that requirement to the facts of this case.

the court granted the District's motion. It did so only after independently weighing the evidence favorable to Johnson against other evidence presented at trial, and concluding, based on its consideration of "all the evidence at trial, [that] this evidence is not such that reasonable people could find it adequate to support the conclusion that Traaen – and through her the District – regarded Johnson as disabled." The district court's approach was error.

A jury's verdict must be upheld if it is supported by substantial evidence. *Gilbrook*, 177 F.3d at 856. Substantial evidence is evidence adequate to support the jury's conclusion, even if it is also possible to draw a contrary conclusion from the same evidence. *Id.* Thus, "although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe," *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2110 (2000), and may not substitute its view of the evidence for that of the jury. *Gilbrook*, 177 F.3d at 856.

In light of these bedrock principles delineating the trial judge's limited role in reviewing a jury's factual findings, the district court's conclusion that "standing in isolation [the evidence before the jury] might be said to support an inference that Traaen believed Johnson was disabled within the meaning of the ADA" should have ended that court's inquiry. That there was also evidence favorable to the District was simply not relevant, since the jury was free to disbelieve, and therefore to disregard, that evidence. *See id.* More specifically, "in entertaining a motion for judgment as a matter of law . . . the court must draw all reasonable inferences in favor of the nonmoving

party, and it may not make credibility determinations or weigh the evidence." *Id.* The district court erred by drawing a number of inferences, and making credibility determinations, in the District's favor.

First, Traaen testified that she was accustomed to relying on medical opinion. The district court credited this statement and found that this testimony undercut the jury's apparent inference that, in forming her own opinion, Traaen relied on Johnson's statement that she did not know if or when she would ever work again. "It is not the province of a court to spin such evidence in an employer's favor when evaluating its motion" for judgment as a matter of law.[4] *Chuang v. University of California*, 225 F.3d 1115, 1129 (9th Cir. 2000).[5]

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[4] Similarly, the district court was not entitled to rely, as it apparently did, on an unstated assumption that Traaen assessed Johnson's degree of physical impairment by considering all the evidence marshaled in the district court opinion tending to show that Johnson was not disabled. The court, for instance, emphasized the fact that Johnson had received a full release by the time the District began marking her applications DNP as evidence that the District must not have regarded her as disabled. This evidence was, however, irrelevant to Traaen's beliefs at the earlier point at which three of the four allegedly discriminatory acts occurred. And even with respect to the fourth allegedly discriminatory act – the refusal to consider Johnson's applications – there is no reason that the jury was required to conclude that Traaen believed and acted upon the doctor's views concerning Johnson's ability to work.

[5] Although *Chuang* is a summary judgment case, "[t]he standard for granting a summary judgment is equivalent to the standard for granting a judgment as a matter of law under Fed. R. Civ. P. 50." *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1121 (9th Cir. 1994) (citing *Celotex Corp. v. Catrett*, 417 U.S. 317, 323 (1986)).

Second, the district court found that Johnson's statement to Traaen regarding whether she would ever return to work was ambiguous, in that it could have signified inability to resume only the job she held at the District and not a "class or broad range of jobs," as required to show a substantial limitation on the major life activity of working. *See Sutton*, 571 U.S. at 492-93. As noted above, however, the jury instructions contain no discussion of the class or broad range of jobs requirement, and the District may not now challenge the instructions, having stipulated to them at trial.

Moreover, there is substantial other evidence from which the jury could have concluded that the District regarded Johnson as disabled from a class or broad range of jobs. That evidence includes the undisputed fact that the District refused to consider her for thirteen different maintenance and groundskeeping jobs. It also includes the testimony that the District enforced a policy of refusing to accept "partial releases" for employees in any job category; that policy supports an inference that the District regarded Johnson, and other injured employees, as unable to perform any job. *See McGregor v. National R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999) ("A '100% healed' or 'fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.") (citations omitted).

Third, the district court relied impermissibly on inferences in the District's favor from two remarks that Traaen made to Johnson in the course of their May 13 meeting. Johnson testified that, after Traaen encouraged her to resign by telling her it would look better on her resume than being fired, Traaen said "maybe you'll get a release, and you can apply for another job," and offered to write Johnson a letter of recommendation.The district court improperly viewed these remarks in the light most favorable to the District, *see Gilbrook*, 177 F.3d at 847-48, as evidence that Traaen *sincerely* believed Johnson was employable, and was not, therefore, disabled. But the jury could reasonably have inferred instead that Traaen was trying to induce Johnson's resignation, rather than expressing a belief that Johnson was not disabled. Further, Traaen's statement at best suggested that Johnson might become employable in the future, and is therefore of little relevance on the question whether Traaen viewed Johnson as disabled at the pertinent times.

Finally, with respect to Johnson's thirteen applications for maintenance and groundskeeping jobs with the District, the district court took at face value Traaen's explanations for the fact that Johnson's applications were marked DNP, although there was evidence (including the timing of the first rejection and the history of Johnson's positive job evaluations despite her attendance problems) from which the jury could have concluded that the explanations were pretextual.

Indeed, Traaen's arguably pretextual explanations themselves could appropriately be considered as affirmative evidence of the District's motivation in rejecting

Johnson's applications. As the Supreme Court recently remarked:

> Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.

Reeves, 120 S. Ct. at 2108. Similarly, finding pretextual an explanation for an adverse employment action can affirmatively support the conclusion that the employer was dissembling to cover up the fact that it regarded the employee as disabled.

The district court's conclusion, in short, depended on that court's improper usurpation of the jury's basic fact-finding authority, including the authority to draw inferences from the facts established and to believe some witnesses but not others. Although the evidence was far from overwhelming, and the jury was not compelled to conclude that Traaen regarded Johnson as disabled, neither can it be said that the jury's conclusion to that effect was unsupported by substantial evidence.

Further, while the district court's approach to deciding the motion for judgment as a matter of law would have been improper whatever the nature of the underlying cause of action, it was particularly improper after an

ADA "regarded as disabled" trial. Although Traaen's apparent belief that Johnson was disabled was based on flimsy evidence – given that Johnson was not, in fact, disabled – Johnson was not required to show that Traaen's opinion was well-founded. To the contrary, Johnson's "regarded as disabled" cause of action rested on the assertion that the District was acting irrationally, rather than on the basis of the true facts and rational economic calculation. *See Sutton*, 527 U.S. at 490 ("the purpose of the regarded as prong is to cover individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities") (quoting 29 CFR pt. 1630, App. § 1630.2(*l*)). Given the context, dissecting the evidence before Traaen to show that, as reasonably interpreted, it demonstrated that Johnson was *not* disabled, was a task of no pertinence to the substantial evidence question before the district court on the District's motion for judgment as a matter of law.[6]

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[6] The District asserted at oral argument that Johnson cannot prevail without direct evidence that the District regarded Johnson as disabled. There is language in the opinion of the district court that suggests that that court also believed that direct evidence of the District's beliefs or motives was required. That is not the law. In employment cases, "[a]s in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *United States Postal Service v. Aikens*, 460 U.S. 711, 714 (1983). Indeed, where the trier of fact must determine the employer's state of mind, "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *Id.* at 716-17. Thus, direct evidence of state of mind is not required to prove that an employer regarded an employee as disabled.

C. New Trial

The district court granted respondents' motion for a new trial on the ground that the verdict was against the weight of the evidence. The grant or denial of a motion for a new trial is typically reviewed for an abuse of discretion. *Venegas v. Wagner,* 831 F.2d 1514, 1519 (9th Cir. 1987). Nonetheless, "a stringent standard applies when the motion is based on insufficiency of the evidence. A motion for a new trial may be granted on this ground only if the verdict is against the great weight of the evidence or it is quite clear that the jury has reached a seriously erroneous result." *Id.* at 1519 (citations omitted).

Normally we are quite deferential to the district court in these matters. *See United States v. 4.0 Acres of Land,* 175 F.3d 1133, 1139 (9th Cir. 1999); *United States v. Kellington,* 217 F.3d 1084, 1097 (9th Cir. 2000). The question may be different, however, when, as in our case, the district judge who granted the new trial motion did not preside over the jury trial. *Compare Bankcard America, Inc. v. Universal Bancard Sys., Inc.,* 203 F.3d 477, 481 (7th Cir.), *cert. denied,* 121 S. Ct. 186 (2000) (no deference to successor judge), *with Langevine v. District of Columbia,* 106 F.3d 1018, 1023 (D.C. Cir. 1997) (the new judge's ruling, "like any ruling on a motion for a new trial, is reviewed for abuse of discretion"). *Cf. Canseco v. United States,* 97 F.3d 1224, 1227 (9th Cir. 1996) (we review the successor judge's ruling after a bench trial for abuse of discretion).

We need not decide what standard would apply here because even under the more deferential standard, we conclude that the district court's grant of a new trial was infected by errors similar to those that infected its entry

of judgment as a matter of law: The district court relied on its virtually *de novo* assessment of the evidence, substituting its own inferences and credibility determinations for those of the jury. In other words the district court concluded only that the jury verdict was, on the court's own assessment of the evidence, wrong; the court never determined that the jury's contrary view was "against the *great* weight of the evidence or . . . *seriously* erroneous." *Venegas*, 831 F.2d at 1519 (emphasis added). So, the district court applied the wrong standard and thereby abused its discretion. Further, for the reasons discussed above, we believe that any finding that this "stringent standard" was met, on this record, would be an abuse of discretion. Accordingly, we REVERSE the conditional grant of the District's motion for a new trial.

REVERSED in all respects and REMANDED to the district court for entry of judgment consistent with the jury verdict.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

LINDA JOHNSON, Plaintiff, vs. PARADISE VALLEY UNIFIED SCHOOL DISTRICT, Defendant.	CIV 97-823 PHX EHC (JWS) ORDER FROM CHAMBERS [Re: Motion for Entry of Judgment or, in the Alternative for a New Trial – Docket 176; Motion for Attorneys' Fees – Docket 175; Supplemental Motion for Attorneys' Fees – Docket 180; Vacation of Judgment Docket 170] (Filed Oct. 29, 1999)

I. MOTIONS PRESENTED

At docket 176 defendant Paradise Valley Unified School District ("District") moves for entry of judgment as a matter of law, or in the alternative for a new trial, pursuant to Rules 50 and 59, Federal Rules of Civil Procedure. Plaintiff Linda Johnson ("Johnson") opposes the motion. Oral argument was heard on October 20, 1999.

This order also disposes of Johnson's motion for attorneys' fees at docket 175 and her supplemental motion for attorneys' fees at docket 180.

Finally, this order vacates the judgment at docket 170 and directs the clerk to prepare a new judgment.

II. BACKGROUND

Johnson sued the District alleging violations of the Americans With Disabilities Act, 42 U.S.C. §§ 12101, *et seq.* ("ADA"). The case was tried before the Honorable Bruce M. Van Sickle, but thereafter was reassigned when Judge Van Sickle became unable to proceed further. Having reviewed the file, including the transcripts provided by the parties, the undersigned certifies that he is familiar with the record and may complete the trial level proceedings without prejudice to any party.[1]

In a pre-trial order addressing the District's motions for summary judgment, Judge Van Sickle summarized the events which gave rise to the litigation as follows:

> Johnson injured her leg on July 9, 1995, in a work-related accident which required surgery to repair damaged nerve tissue, connective tissue, and skin. Johnson returned to work in September of 1995. Johnson worked full time until late December of 1995; at that point, Johnson left work due to the pain associated with her prior injury. On February 5, 1996. Johnson asked for and received a limited release which stated that Johnson could return to work although she was precluded from engaging in prolonged standing or walking, and was required to change positions frequently. Johnson forwarded the limited release to [the District which] received the release the same day. However, in 1996, it was the policy of [the District] not to allow

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[1] The court assumes that Fed. R. Civ. P. 63 applies in the present circumstances.

> employees to return to work with less than a full release.
>
> On or about May 13, 1996, Johnson met with Ms. Eileen Holushu, Benefits Coordinator and Dr. Terry [sic] Traaen ("Traaen"), Director of Employment, to discuss Johnson's employment status. Although it is the policy of [the District] to allow employees to use accrued vacation time and sick time to cover absences and extended leave of absences [sic], on or about May 14, 1996, Johnson submitted a letter of resignation to [the District]. * * *
>
> After Johnson's separation from [the District] on May 14, 1996, she applied for seven separate positions at [the District] * * * Johnson's [first] application was marked "DNP" or do not process. [Her other applications were also marked DNP.][2]

Judge Van Sickle then analyzed the undisputed facts concerning Johnson's condition and held that she was not disabled within the meaning of the ADA. However, be also held that there were disputed issues of material fact concerning the possibility that the District regarded Johnson as disabled.[3]

After the ruling on summary judgment, Johnson retained four distinct claims for violation of the ADA, because she complained of four distinct adverse actions

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[2] Memorandum and Order, Docket 112 at pp. 2-3. At trial the evidence showed that there were thirteen applications marked DNP, rather than seven. *See* the discussion of evidence at trial below.

[3] Memorandum and Order, docket 112.

taken against her by the District.[4] All four claims depended in part upon proof that the District regarded Johnson as having a disability, and Judge Van Sickle's instructions to the jury explained that as one element of each claim Johnson must prove that the District regarded Johnson as having an impairment which substantially limited a major life activity.[5]

The case was presented to a jury from February 16 through February 19, 1999. The jury returned a general verdict in favor of Johnson on February 22, 1999, which awarded Johnson damages of $237,345.[6] The District moved for a judgment as a matter of law at the close of plaintiff's case.[7] The motion was denied by Judge Van Sickle.[8] Judgment was entered on the verdict on February

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[4] The first claim was based on the District's refusal to allow Johnson to return to work; the second on the District's refusal to allow Johnson to use accrued vacation and sick leave to cover her absence; the third claim on the District's constructive discharge of Johnson; and the fourth on the District's refusal to rehire Johnson. *See*, Transcript volume entitled: "Reporter's Transcript of Proceedings, Phoenix Arizona. Friday, February 19, 1999" (hereafter "T.2/19") at pp. 130-131, 136 and 137. The parties provided extracts from the trial transcript to support their respective positions. The District also provided a complete transcript to the court. Citations in this order are to the volumes of the complete transcript. Nevertheless, the extracts are helpful in showing clearly areas each party believes important.

[5] *Id.*

[6] Docket 190 at p. 3.

[7] Transcript volume entitled "Transcript of Jury Trial" and also identified as "Phoenix, Arizona, February 18, 1999, 9:01 AM" (hereafter "T.2/18") at pp. 26-28.

[8] *Id.* at p. 28

24, 1999.[9] The District timely renewed its motion for judgment as a matter of law on March 5, 1999.[10]

III. DISCUSSION

A. Elements of An ADA Claim

To prove that an employer has discriminated against an employee in violation of the ADA it is necessary for the employee to establish three things: (1) the employee is a disabled person within the meaning of the ADA; (2) the employee is qualified for a job, which means that either with or without reasonable accommodations by the employer, the employee can perform the essential aspects of the job; and (3) that the employer directed some negative employment action against the employee because of her disability.[11] A person is disabled within the meaning of the ADA if she has a physical or mental impairment which substantially limits a major life activity.[12] Major life activities include working, but where working is the major life activity being considered: "To establish a substantial limitation, [plaintiff] must demonstrate that she is 'significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' 29 C.F.R. § 1630.2(j)(3)(i). The

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[9] Docket 170.

[10] Docket 176.

[11] *E.g., Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996).

[12] 42 U.S.C. § 12102(2)(A).

inability to perform one particular job does not constitute such a limitation."[13] The first element can be established either by proving the existence of a disability, or by proving that the employer regarded the employee as having a disability.[14]

B. Standards Applicable to Motions

A motion for judgment as a matter of law should be granted only if substantial evidence to support the verdict was not admitted at trial.[15] Substantial evidence in this context means relevant evidence which reasonable people might find adequate to support a conclusion, even if an alternate and inconsistent conclusion might also be supported.[16]

The standard applicable to motions for a new trial has been suitably described as follows in one leading treatise:

> The draftsman of the [Federal Rules of Civil Procedure] found that it was impracticable to enumerate all the grounds for a new trial. Thus [Rule 59] is stated in broad terms. It has been said that the general grounds for new trial are that the verdict is against the weight of the evidence, that the damages are excessive, or that

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[13] *Thompson v. Holy Family Hosp.*, 131 F.3d 537, 540 (9th Cir. 1997).

[14] 42 U.S.C. § 12102(2)(C); *Hollhan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996).

[15] *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999).

[16] *Id.*

> for other reasons the trial was not fair, and that the motion may also raise questions of law arising out of substantial errors in the admission or rejection of evidence or the giving or refusal of instructions. The absence of specific grounds should not obscure the governing principle. The court has the power and duty to order a new trial whenever in its judgment, this action is required in order to prevent injustice.[17]

C. The Request for Judgment As a Matter of Law

1. The Evidence at Trial

The District's request for judgment as a matter of law rests on the proposition that there was no substantial evidence to show that the District regarded Johnson as disabled within the meaning of the ADA. Johnson points to the testimony of Teri Traaen, the District's Director of Employment, and to Johnson's own testimony to show that there was substantial evidence. While she also relies on the fact that all of Johnson's post-termination applications for re-employment were marked "DNP," Johnson points to no other agent of the District who regarded her to be disabled. Neither has the court's review of the transcript suggested any other District employee who may have regarded Johnson as disabled within the meaning of the ADA. The focus on the present inquiry, then, is on the question whether there is substantial evidence to support the conclusion that Traaen regarded Johnson as having an impairment that substantially interfered with a major life activity.

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[17] Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d*, § 2805 at pp. 54-55.

Johnson had several contacts with Traaen. Johnson's versions of these contacts differ from Traaen's in many respects. For example, Johnson testified that Traaen told her she must resign or be fired, a point which Traaen flatly denied.[18] For purposes of the pending motion, the court must accept any evidence which supports Johnson's position, because it was for the jury to resolve credibility issues. Thus, the court accepts Johnson's version of her meetings with Traaen whenever there is a conflict in the testimony. In addition, any testimony by Traaen upon which Johnson now relies will also be accepted for the jury was free to believe some of Traaen's testimony, even if it did not believe all of it.

According to Johnson, the first meeting with Traaen occurred at the time when Johnson was returning to workers' compensation status in December of 1995. At that time Johnson went to Traaen's office and showed her the note from Dr. Socia placing Johnson back on workers' compensation.[19] Johnson described the July 9, 1995 leg injuries to Traaen. Johnson told Traaen that she had to keep weight off the injured leg due to swelling and also told she [sic], "[A]t that time I didn't know if and when I'd ever be able to come back to work."[20] Johnson wore

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[18] *Compare* Johnson's testimony on this topic at p. 38 of transcript volume entitled "Jury Trial Testimony of Linda E. Johnson (Partial Transcript) Phoenix, Arizona, February 17, 1999" (hereafter "T.2/17AM") with Traaen's testimony on the same subject at T.2/18, pp. 162-3.

[19] T.2/17AM at pp. 25 and 35; Transcript entitled "Transcript of Jury Trial" and also identified "Phoenix, Arizona, February 17, 1999, 1:20 PM" (hereafter "T.2/17PM") at p. 22.

[20] T.2/17AM at p. 35.

shorts to the December meeting, so Traaen could have observed the injured leg.[21]

Less than two months later, on February 5, 1996, Dr. Ladin gave Johnson a release to return to work, but the release stated that she was restricted to work that did not require prolonged standing or walking and which would allow her to change positions frequently.[22] Johnson took the release to Traaen the same day.[23] Traaen looked at the release and told Johnson that the District didn't take limited releases.[24]

Johnson's next contact with Traaen was on May 13, 1996, when Johnson was summoned to Traaen's office because her 100 days of allowable absence from her job had expired.[25] Johnson brought a written request for a one-year leave of absence due to "complications of my injury" with her to the meeting. After Traaen looked at the request, she told Johnson she could not have any leave and that her 100 days were up, so Johnson could either resign or be fired.[26] Traaen explained that a resignation might look better on a resume, and according to Johnson Traaen added, "Maybe you'll get a release and

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[21] *Id.*

[22] Transcript volume entitled "Transcript of Jury Trial" which is further identified as "Phoenix, Arizona, February 16, 1999, 8:10 a.m." (hereafter "T.2/16") at p. 172.

[23] T.2/17AM at p. 35.

[24] Id. at p. 36.

[25] *Id.* at pp. 36-38.

[26] *Id.* at p. 38.

you can apply for another job."[27] Traaen also offered to give Johnson a recommendation.[28] The next day Johnson submitted her letter of resignation, viewing it as the lesser of two undesired outcomes. When she gave Traaen the letter of resignation, Traaen again offered to provide Johnson a letter of recommendation.[29]

Johnson also relies heavily on portions of Traaen's testimony.[30] Johnson first points to some background information which establishes that Traaen had been the District's Director of Employment for more than thirteen years at the time of trial with responsibility for a wide range of employment functions involving 4,000 employees.[31] In another passage relied upon by Johnson, Traaen recounted the meeting of May 13, 1996. According to Traaen, at that time Johnson advised Traaen that she was feeling, "Terrible, I'm in constant pain."[32] Traaen conceded that there would be no way to dispute this statement of subjective condition.[33] After recounting two more assertions by Johnson regarding her pain, Traaen then testified that Johnson said, "I just think I have to resign. You know, I don't see how I can ever work again.

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[27] *Id.* at p. 39.

[28] *Id*

[29] *Id.* at p. 40.

[30] Her principal reliance is on Traaen's direct testimony at T.2/18 at pp. 167-169, but she also relies on a brief portion of cross which essentially reconfirms what Traaen said on direct. T2/19 at p. 28.

[31] T.2/18 at p. 148.

[32] *Id.* at p. 168.

[33] *Id.*

I'm in constant pain."[34] Traaen then testified that she took a look at Johnson and believed "she truly did look like she was in constant pain. She did look like she was uncomfortable, like there was a residual difficulty for her that was very genuine."[35] Traaen then testified that she was accustomed to placing heavy reliance on evaluations by medical experts and so was "stunned" that a longtime employee like Johnson would resign.[36]

While Traaen expressly denied having ever regarded Johnson as disabled,[37] this testimony cannot be considered of much consequence, because the jury was free to and in many respects obviously did disbelieve Traaen. On the other hand, it is significant that Johnson conceded that nobody from the District ever told her that she was regarded as being unable to do her job.[38] Indeed, there is no direct evidence of any kind that anyone at the District regarded Johnson as disabled within the meaning of the ADA.

The other evidence upon which Johnson relies to show that the District must have regarded her as disabled is the fact that all thirteen of the applications she made for re-employment by the District were marked "DNP," an acronym meaning "do not process."[39] Presumably Johnson's view is that the jury may have drawn the

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[34] *Id.* at p. 169.

[35] *Id.*

[36] *Id.* at p. 170.

[37] T.2/18 at p. 149.

[38] T.2/17PM at pp. 64-65.

[39] T.2/17/AM at pp. 49-61.

inference that the applications were marked DNP, because the District regarded her as disabled. However, Johnson points to no testimony which would directly support that inference, and such an inference would be inconsistent with the fact that all of the DNP decisions were made *after* Johnson obtained an unrestricted medical release on June 3, 1996.[40] Further, the record supports the inference that the applications were marked DNP either because Johnson was believed by Dr. Krebs, the District's assistant superintendent for personnel, to have been a troublesome employee,[41] or because Johnson had chronic attendance problems as reflected in a series of evaluations.[42] Johnson's counsel elicited testimony from Traaen on cross-examination to the effect that absenteeism was a reason for marking Johnson's applications DNP.[43]

2. The Evidence Is Not Substantial

Having carefully reviewed the entire transcript with emphasis on the testimony the parties say is most important, the court concludes that the only evidence that the District regarded Johnson to have an impairment which

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[40] *Id.* pp. 49-50.

[41] T.2/18 at p. 53. Krebs relied on Traaen and Holusha's version of events which transpired when Johnson resigned in reaching his conclusion, whereas the jury likely believed Johnson's version, but the truth of what happened when she resigned is not what is important in this context, but rather what motivated Krebs. The only evidence is he was motivated by the negative information available to him about Johnson, not by a belief that she was disabled.

[42] T.2/17PM at pp. 5-10.

[43] T.2/19 at p. 44.

substantially limited a major life activity is very, very weak.

To begin with, the weakest evidence upon which Johnson relies, the court finds that the marking of the thirteen post-termination employment applications with the acronym DNP does not support the conclusion that the district regarded Johnson as disabled. The applications were all marked *after* Johnson got a full release to return to work. It would be irrational to infer that at that point in time the district considered Johnson to be disabled. Moreover, there is testimony that provides a rationale for the DNP decisions which have nothing to do with Johnson being disabled and which is supported by documentary evidence in the form of Johnson's evaluations. This is not evidence which reasonable people would find to provide *any* support for the conclusion that the District regarded Johnson as disabled.

Johnson's better evidence is Traaen's knowledge of Johnson's injury, particularly the knowledge gained in the meeting on May 13, 1999. At least standing in isolation, this evidence might be said to support an inference that Traaen believed Johnson was disabled within the meaning of the ADA. However, considering all the evidence at trial, this evidence is not such that reasonable people could find it adequate to support the conclusion that Traaen – and through her the District – regarded Johnson as disabled within the meaning of the ADA.

Traaen was an experienced personnel manager. Traaen was aware of the fact that Johnson had been able to work from September to December. Traaen knew that after a short period of time off Johnson had been given a

release to work in February, subject to only minor restrictions. Traaen contemplated the possibility that Johnson might be given a full work release, and according to Johnson, Traaen twice stated that she would give Johnson a recommendation for future work. Traaen was accustomed to placing heavy reliance on "medical experts." Traaen lacked any input from medical experts to the effect that Johnson was disabled. Traaen did have what Johnson said about her pain on May 13, 1996. But, what Johnson said must be considered in context. The statement was made by an individual at a time when she was reporting severe pain which the observer, Traaen, concluded was genuine. In that state, Johnson said she "did not see how I could ever work again." The statement was made in the midst of an unpleasant and stressful situation. The statement was not made by a person whose then condition could have inspired confidence in its accuracy. The statement was not supported by any medical evidence, or opinion. The statement was made to an experienced personnel manager who was accustomed to making decisions based upon the advice of medical experts. The statement was also ambiguous in the sense that it did not necessarily apply to a class of jobs, or a broad range of jobs, for it was made in association with resigning from one particular job.

In sum, the jury's finding that the District regarded Johnson as disabled must be given effect so long as it is supported by relevant evidence that reasonable people would consider adequate to support the finding.[44] Such evidence is lacking here. Reasonable people could not

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[44] *Gilbrook*, 177 F.3d 856.

find the evidence adequate to support the finding that Traaen regarded Johnson as disabled within the meaning of the ADA. This does not mean that the jury was composed of unreasonable people, but rather that the jury's collective decision-making process was led astray by sympathy for Johnson, animosity toward Traaen, or some other prejudice such that the jury did not reach a reasoned conclusion.

The right to a trial by jury is, of course, a right of Constitutional dimensions. This court does not take lightly the responsibility it shoulders when it awards judgment as a matter of law contrary to a jury verdict. However, where the evidence does not support a jury verdict, it is the court's obligation to do so. On the record in this case, the court is compelled to find that there is no substantial evidence to support the conclusion that the District regarded Johnson as disabled within the meaning of the ADA. Without proof of that element, all four of Johnsons' claims fail.

D. The Request for a New Trial

When a renewed motion for judgment as a mater of law is granted, there is always a possibility that the trial court's decision will be reversed on appeal. For that reason, Rule 50(c) provides that the trial court should also rule on the motion for a new trial, although obviously there will be no new trial if the judgment is not reversed on appeal.

The District argues that a new trial is warranted for several reasons. This court finds that only one of them – that the verdict is against the evidence – has independent

merit. If this court's judgment as a matter of law is reversed on appeal, then a new trial should be held, because the jury verdict depends upon a finding that the District perceived Johnson to be disabled. This court believes that there was not adequate relevant evidence to allow reasonable people to conclude that the District regarded Johnson as disabled within the meaning of the ADA. It follows *a fortiori* that a verdict which is based upon such evidence is against the weight of the evidence and a new trial is required to prevent an injustice.

The District also argues that the improper use of depositions at trial, the introduction of irrelevant and prejudicial evidence, the use of the District's discovery responses, and the conduct of plaintiff's counsel also each warrant a new trial. After examining these issues, the court concludes that they do not warrant a new trial. Finally, the District argues that there was no evidence to support an award of $85,000 in compensatory damages for pain and suffering. The court disagrees. The award is not without foundation in the evidence. Johnson testified that the treatment she received from the District caused her to suffer headaches, lack of sleep, crying spells, fatal lapses in attention to her pets and generally a loss of confidence and independence.[45] There is no requirement that damages for pain and suffering be proved up according to a particular formula. Indeed, measuring damages for pain and suffering is not an exercise which lends itself to any particular method or calculation. While this court

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[45] T.2/17AM at pp. 72-74; T. 2/17 PM at pp. 97-98. According to her husband, Johnson even threatened suicide. T. 2/17PM at p. 98.

finds the award of $85,000 for pain and suffering to be generous, it cannot say that the award is so inadequately supported by the evidence that a new trial is warranted.

IV. CONCLUSION

For the reasons set out above, the District's motion for judgment as a matter of law at docket 176 is **GRANTED**, and the request for a new trial at docket 176 is **CONDITIONALLY GRANTED**, but there will be no new trial unless this court's judgment as a matter of law is reversed on appeal. The judgment at docket 170 is **VACATED**. The Clerk will please prepare a new judgment that plaintiff take nothing from defendant.

It necessarily follows from the above disposition of the motion at docket 176 that the motions at dockets 175 and 180 are **DENIED**.

DATED at Anchorage, Alaska, this 27th day of October 1999.

/s/ J W Sedwick
JOHN W. SEDWICK
UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LINDA JOHNSON, Plaintiff-Appellant, v. PARADISE VALLEY UNIFIED SCHOOL DISTRICT, Defendant-Appellee	No. 99-17530 D.C. No. CV-97-00823 JWS **ORDER** (FILED JUN. 19, 2001)

Before: KOZINSKI, HAWKINS, and BERZON, Circuit Judges.

Defendant-Appellee's petition for rehearing is denied.

(2)

NO. 1-452

FILED
NOV 1 2001
CLERK

In The

SUPREME COURT OF THE UNITED STATES

PARADISE VALLEY UNIFIED SCHOOL DISTRICT,

Petitioner,

vs.

LINDA JOHNSON,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 2001

18 pp

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STATEMENT OF THE CASE

Respondent, Linda Johnson, by and through her attorney undersigned requests that this Court deny the Petition for Certiorari filed by Petitioner Paradise Valley Unified School District, seeking review of the decision of the Ninth Circuit entered in this case on May 24, 2001. The Ninth Circuit denied a Petition for Rehearing on June 19, 2001. Petitioner Paradise Valley Unified School District filed the Petition for Writ of Certiorari on or about September 14, 2001.

COUNTER-STATEMENT OF THE CASE

Respondent, Linda Johnson, was employed with Paradise Valley Unified School District as a Custodian I from August 23, 1982 to July 27, 1987. She was promoted to the position of Groundskeeper I, and held that position from July 27, 1987 to April 13, 1989. On April 13, 1989 she was promoted to the position of Groundskeeper II. She held that position until May 14, 1996. On Sunday, July 9, 1995, a golf cart severely damaged Linda Johnson's left leg while she was working for Paradise Valley Unified School District. She needed surgery to repair her leg.

Dr. Kevin Ladin testified that Respondent severely injured her leg and had severe problems with pain in her leg, subsequent to July 9, 1995. He testified on February 15, 1999 that Respondent sustained a degloving type injury in which her leg was crushed and the skin was pulled away from the leg, exposing muscular tissue and resulting in nerve damage. Respondent had surgery and she was placed on medication to relieve her pain. Dr. Ladin testified Linda Johnson

complained of ongoing problems with pain of a burning quality and some intermittent sharp stabbing lancinating pain. He testified within a reasonable degree of medical probability, Respondent, Linda Johnson could have done the job of Groundskeeper with modified restrictions on February 6, 1995.

Respondent Linda Johnson testified that after her injury she spoke to Teri Traaen, Director of Employment, who gave her a slip to go on Industrial Workman's Compensation. Respondent testified that she told Teri Traaen "the electric cart crushed my leg and tore the skin, muscle, and all the tissue off my leg. I was on crutches because I had to keep weight off my foot because it was swelling, and I told her that . . at that time that I didn't know if and when I'd ever be able to come back to work". She testified that she was wearing shorts and Teri Traaen could see her leg. Respondent was not able to walk on her leg.

On February 5, 1996 Respondent received her limited release to go back to work from Dr. Kevin S. Ladin. She went to the school district and saw Teri Traaen, Director of Employment. Ms. Johnson testified that she gave Teri Traaen the modified release "[a]nd Teri looked at me and said "we couldn't do this: 'we don't take limited releases' and I said - - then I went home". Although Petitioner admitted in its Answers to Interrogatories, Joint Pretrial Statement, and in the Answer to the Complaint that they had received the modified release, at trial they denied ever seeing it. Respondent in her statement of the case seems to admit receiving the release by stating that there were significant limitations on the release.

On May 13, 1996 Respondent Linda Johnson had a meeting with Director of Employment Teri Traaen. She had been off of work for more than 100 days. Respondent

brought a note requesting a one year leave of absence due to complications of her injury. It was the policy of the school district to allow an employee to utilize their accrued vacation time and sick time to cover periods of absence. Ms. Traaen told her she would not give her this leave. Ms. Johnson requested to use her accrued vacation and sick leave benefit time to extend her time off of work, and Ms. Traaen said "no". Ms. Traaen told Respondent she had to resign or be fired. Respondent testified that she told Teri Traaen that she didn't want to resign and had never been fired in her life. She testified she told Ms. Traaen she wanted her job. It wasn't her fault that she was injured. Respondent Linda Johnson testified that Teri Traaen told her that after she received a full release from her doctor, she could reapply for another job. Respondent Linda Johnson testified that she told Teri Traaen she wanted to think about the matter. She said she went into the reception area and saw a co-worker, Ms. June Kaiser. She testified she was upset and crying and she told Ms. June Kaiser "Teri Traaen is making me resign or she's going to fire me". Ms. June Kaiser also testified to this conversation. She testified that Linda Johnson told her she had to resign or be fired.

Ms. Johnson testified that on May 13, 1996, she went home and had a conversation with her husband, Larry Johnson, and Mr. Nidal Melhem, her daughter's boyfriend, about the matter. She said that she told them "They are making me resign or be fired". She told them that Teri Traaen told her a resignation would look better on a new application than a termination.

Larry Johnson and Nidal Melhem also testified before the jury. Both testified there was a conversation with Ms. Linda Johnson on the evening of May 13, 1996, at which time she told them that she had to make up her mind as to whether or not she would resign or be terminated. Respondent Linda

Johnson testified she saw Ms. Traaen the next morning. Ms. Traaen asked if she had a full release. Ms. Johnson said, "no", and Ms. Traaen replied, "Well, you have to resign or be fired." Ms. Johnson resigned. The resignation letter was typed with the date of May 13, 1996, but Linda Johnson signed it putting the date May 14, 1996, under her signature.

Director Employment Teri Traaen testified to a different set of facts regarding her meeting with Linda Johnson on May 13, 1996. Director of Employment Teri Traaen testified that on May 13, 1996, she had a meeting with Respondent Linda Johnson and that Respondent Linda Johnson opened her purse and showed her all of her prescription medicine and told her that she was in great pain and would never work again. Ms. Teri Traaen testified that Linda Johnson made the following statements to her in this meeting:

A. My inquiry first off was to say to Ms. Johnson, 'How are you? What is the status of your situation? How are you feeling?' Just a general inquiry into her well-being.

Q. And what was her response?

A. Her response was, you know 'terrible. I'm in constant pain' and I was, I think, a little taken back by that, but certainly when an employee self reports that, there is not a way to dispute it and I don't know that I would have even attempted to dispute that.

Q. Okay.

A. Her next effective gesture or response was to pull open her purse that she had with her and say, 'I'm on medication all the time for the pain.' And we were sitting at a round table in my office, and as she pulled open her purse, there were approximately half a dozen pill bottles in the purse, and they appeared to be covering anything else that was perhaps in the lower portions of that receptacle. I remember thinking, my goodness, you know, that's a lot of medication to be on. And I said, 'Well, what are you thinking, you know, what's your situation?' Because again, there was nothing, no paperwork provided by Ms. Johnson at that point, just this admonition ad, 'I'm in constant pain all the time.' And she said, 'Well, I don't know. You know my leg is just hurting all the time.' (CR 189, testimony of Traaen, February 18, 1999, p. 167, l: 21 - 169, l: 5).

Teri Traaen testified that Linda Johnson said "You know, I don't know see how I can ever work again. I'm in constant pain. On cross-examination, Ms. Traaen once again confirmed that Linda Johnson stated that she was in constant pain and would never work again and that Ms. Traaen made a note to that effect. Teri Traaen wrote in her notes "constant pain", "never work". Director of Employment, Teri Traaen, testified Ms. Johnson's pain looked genuine and she had no reason to doubt the statements that Respondent not in constant pain and could never work again. Director of Employment Teri Traaen testified that Respondent quit her

position. At trial Teri Traaen testified that she never told any employee that they would have to have a full release or be terminated. Dan Gallagher, Groundskeeper, and Jay Brewer, Groundskeeper, testified that Director of Employment Teri Traaen had told them after they were off of work for 100 days, if they did not have a full release to return to work, they would be terminated.

Respondent received a full release to return to work on June 3, 1996. Both before and after she received the full release, she applied for open positions at Paradise Valley Unified School District. She applied for at least 13 positions. She applied for a broad range of jobs including, but not limited to, positions of Maintenance Technician, Groundskeeper I, General Maintenance Worker, and Groundskeeper II. She was never called or interviewed for any of these positions. All of her applications were marked "DNP" or "Do Not Process".

Respondent was clearly qualified for the positions of Groundskeeper I and Groundskeeper II. She had held the position of Groundskeeper I from July 27, 1987 to April 13, 1989, and the position of Groundskeeper II from April 13, 1989 up until May 14, 1996.

James Jurs is the Superintendent of the Paradise Valley School District. A portion of his deposition was read to the jury. In it, he admitted under oath that Linda Johnson should have been considered for any job that she applied for subsequent to the time that she got a full release from Dr. Ladin.

Ms. Teri Traaen, Director of Employment, testified she was involved in the decision to put "DNP", or Do Not Process, on the 13 applications of Linda Johnson. She testified that Respondent's applications were marked Do Not

Process because of an incident in which Linda Johnson appeared in the lobby in a rage. On cross examination, Ms. Teri Traaen admitted that she was placing "DNP" on the applications of Linda Johnson even before the incident in which Ms. Linda Johnson allegedly appeared in the lobby in a rage. Other witnesses, Ms. June Kaiser and Ms. Linda Haze, testified that they were working in the area in which Respondent allegedly was enraged. They testified they never saw Linda Johnson in the lobby in a rage. Ms. Linda Johnson denied ever being in the lobby in a rage.

Ms. Teri Traaen then testified that she put "Do Not Process" on the application of Linda Johnson because of her attendance problems. Respondent's job performance evaluations were introduced as Respondent's Exhibit 4-17. All of her overall ratings are "meets standards" or "exceeds standards". Respondent had never been disciplined for her attendance. At trial, through cross examination, Ms. Teri Traaen testified that Respondent was absent after her injury on July 9, 1995. There was an inference through the testimony that the only attendance problems Respondent might have had might be as a result of the disability she had from her injury suffered on July 9, 1995.

Respondent Linda Johnson contended before the jury that Director of Employment Teri Traaen had violated the Americans with Disabilities Act by failing to allow her to return to work with a limited release on February 5, 1996 because she perceived her as having a disability, by failing to allow her to use her accrued vacation or sick time to extend her leave of absence as was the policy of Paradise Valley Unified School District on May 13, 1996 because Ms. Traaen perceived Respondent of having a disability, by coercing Respondent into resigning causing a constructive discharge on May 14, 1996 because Ms. Traaen perceived Respondent as having a disability, and by failing to hire Respondent in any

of the 13 positions that she applied for subsequent to May 13, 1996 because of her perceived disability.

PROCEEDINGS BELOW

On February 22, 1999 the jury returned a general verdict in favor of Respondent Linda Johnson on her claims that there were violations of the Americans With Disabilities Act. Defendant Paradise Valley Unified School District moved for a judgment as a matter of law at the close of Respondent's case before the trial court judge, Judge Van Sickle. This trial court judge had been present throughout the testimony of the witnesses and the entire proceeding. He denied Petitioner's motion. Subsequently, Judge Van Sickle was unable to continue presiding over this case and other cases. Petitioner filed a motion for a judgment as a matter of law. The case was reassigned to Judge Sedwick from Alaska. He did not have a complete trial transcript of the proceedings. He granted Petitioner's motion for judgment and reversed the jury verdict. Respondent filed an appeal with the Ninth Circuit. The Ninth Circuit held Judge Sedwick abused his discretion. It stated, "It is not the province of the court to spin such evidence in an employer's favor when evaluating its motion for judgment as a matter of law". The jury's verdict was supported by substantial evidence. Even Judge Sedwick had found that there was evidence to support an inference that Director of Employment Teri Traaen believed Respondent Linda Johnson was disabled within the meaning of the Americans with Disabilities Act. This admission and a careful review of the trial transcript led the Ninth Circuit to reinstate the jury verdict.

REASONS FOR DENYING THE WRIT

1. **There is no compelling reason to grant the Writ of Certiorari.**

There is no compelling reason to grant the Writ of Certiorari. Rule 10 of the Rules of the Supreme Court of the United States provides, "Review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will be granted only for compelling reasons". Those include important novel or reoccurring questions or conflicting decisions in the courts. A decision to grant certiorari represents a commitment of scarce judicial resources. Rule 10 states, "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The instant case is merely a factual dispute between the parties. It does not involve a major legal question nor does it involve a conflict between the circuits. The decision of the Ninth Circuit was correct. There is substantial evidence to support the jury's verdict.

2. **The Ninth Circuit's opinion is not contrary to the United States Court's decisions as is stated by Petitioner in their Writ of Certiorari.**

The Ninth Circuit's opinion is not contrary to the United States Court's decisions as is stated by Petitioner in their Writ of Certiorari. Petitioner begins its Writ of Certiorari by insinuating that the Ninth Circuit did not review the trial transcript to determine if there was substantial evidence to support the jury's finding of a violation of the Americans With Disabilities Act. In the Writ of Certiorari, Petitioner claims that the Ninth Circuit applied the jury instructions as the rule of law in the case. It did not. It

recognized that Respondent's claim concerned the major life activities of walking, working, and standing. (Petition for Writ of Certiorari, *App.8a*). Linda Johnson had an injury that severely injured her left leg. She was on pain medication. She could not walk on her leg. She could not stand on her leg. The Ninth Circuit also considered whether or not there was substantial evidence for the jury to conclude that Respondent was substantially limited in the major activity of working in a class or broad range of jobs, even though that was not the jury instruction. It stated:

> Moreover, there is substantial other evidence from which the jury could have concluded that the District regarded Johnson as disabled from a class or broad range of jobs. That evidence includes the undisputed fact that the District refused to consider her for thirteen different maintenance and groundskeeping jobs. It also includes the testimony that the District enforced a policy of refusing to accept "partial releases" for employees in any job category; that policy supports an inference that the District regarded Johnson, and other injured employees, as unable to perform any job. See, *McGregory v. National R.R. Passenger Corp.*, 187 F.3d 1113,1116 (9th Cir. 1999) ("A '100% healed' or 'fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation".) (Writ of Certiorari, *App. 12a.*)

The Ninth Circuit clearly evaluated the case to determine whether there was substantial evidence to find a limitation in the major activity of working in a class or broad range of job as is evidenced by the quote from the Ninth Circuit stated above. The Ninth Circuit did not rely on jury instructions rather than correct legal standards contrary to any United States Supreme Court decision. The Ninth Circuit correctly applied *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 490, 119 S.Ct. 2139 (1999).

Petitioner Paradise Valley Unified School District argues that the Ninth Circuit has made a ruling in conflict with the other circuits. Contrary with this assertion, Respondent then admits in *Air-Sea Forwarders, Inc. v. Air Asia Co., 880 F.2d 176, 183 (9th Cir. 1989), cert. denied, 493 U.S. 1058 (1990).* The Ninth Circuit ruled jury instructions are not the law of the case with respect to rulings on motions to judgment as a matter of law. The United States Supreme Court should not accept Writ of Certiorari in this case.

3. **The Ninth Circuit's opinion does not create a split with the other circuits.**

The Ninth Circuit's opinion does not create a split with the other circuits. Each case depends upon it's own facts. It is not possible to group cases in which courts have granted motions for summary judgment as establishing a conflict among the circuits. Respondent Linda Johnson had more evidence to support her claim than that referenced by defendant in their Writ of Certiorari. Respondent insinuates that the only evidence Linda Johnson had to support her ADA claim was Director of Employment Teri Traaen's "mere knowledge" of her physical impairment. All of the cases cited by the Responded involved the granting of motions for summary judgment and not jury verdicts. The 7th

Amendment to the Constitution protects the right to a trial by jury. Jury verdicts are not to be taken lightly. A trial court judge may not substitute belief for the finding of a jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2110 (2000); *Gilbrook v. City of Westminster*, 177 F.3d 339 (9th Cir. 1999). Respondent Linda Johnson had a severe injury to her leg accompanied by severe problems with pain. She had surgery and was placed on medication to relieve her pain. She continued to have ongoing problems with pain of a burning quality and some intermittent, sharp, stabbing lancinating pain. She was unable to walk on her leg. At the time that she had a modified release to return to work, Director of Employment, Teri Traaen, refused to accept the modified release stating, "We don't take limited released". Subsequently on May 13, 1996 Director of Employment Teri Traaen refused to allow Respondent to utilize her accrued vacation time and sick leave to cover her absence, and coerced her into resigning. According to Ms. Teri Traaen, Linda Johnson, during this meeting, opened up her purse, showed her approximately a half a dozen pill bottles, and said, "I'm in constant pain all the time." . . . "You know my leg is just hurting all the time." . . "You know I don't see how I can ever work again. I'm in constant pain." Director of Employment Teri Traaen testified she accepted these statements as facts. This then became her perception. She wrote "constant pain" and "never work" on her note pad.

The ADA prohibits discrimination against a "qualified individual with a disability". 42 U.S.C. 12112(a). The definition of disability also encompasses those who have a "record of such impairment:" or are "regarded as having such an impairment". 42 U.S.C. 12102(2); *Sutton v. United Airlines, Inc.*, supra; *McAlindin v. County of San Diego*, 192 F.3d 1226 (9th Cir. 1999). "Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities of an individual." 42 U.S.C. §

12102. One or more major life activities includes working in a broad class or range of jobs, walking, or standing. 29 CFR § 630.2(1). Director of Employment Teri Traaen is testifying as to her perception of Respondent's disability. Out of her own mouth she testifies that she perceives Respondent as being in constant pain and never able to work again. She denies ever seeing the modified return to work release, even though Petitioner has admitted in its Answers to Interrogatories, Joint Pretrial Statement, and Answer to the Complaint, that Petitioner did indeed receive the modified return to work release. Teri Traaen refused to allow Linda Johnson to return to work with a limited release. She then violates the School District's policy by refusing to allow Linda Johnson to use her accrued vacation time and sick leave to cover her absence. She coerces Linda Johnson into resigning. Subsequent to Respondent's resignation, Director of Employment Teri Traaen wrote "Do Not Process" on each of the thirteen applications of Linda Johnson. The Ninth Circuit held that Director of Employment Teri Traaen's explanation for writing "Do Not Process" on the applications of Linda Johnson could be used as evidence of pretext and support the disability claim. The Ninth Circuit stated:

> Indeed, Traaen's arguably pretextual explanations themselves could appropriately be considered as affirmative evidence of the District's motivation in rejecting Johnson's applications. As the Supreme Court recently remarked:
>
> > Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of

> fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principal of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt.

Reeves, 120 S.Ct. At 2108. Similarly, finding pretextual an explanation for an adverse employment action can affirmatively support the conclusion that the employer was dissembling to cover up the fact that it regarded the employee as disabled.

> The district court's conclusion, in short, depended on that court's improper usurpation of the jury's basic fact-finding authority, including the authority to draw inferences from the facts established and to believe some witnesses but not others. Although the evidence was far from overwhelming, and the jury was not compelled to conclude that Traaen regarded Johnson as disabled, neither can it be said that the jury's conclusion to that effect was unsupported by substantial evidence. (Writ of Certiorari, App. 13a - 14a).

The Ninth Circuit has not split with other circuits. The Ninth Circuit has not held that mere knowledge of a disability alone is substantial evidence to support a claim of perceived disability under the Americans With Disabilities Act. The Ninth Circuit has reviewed the trial transcripts and found substantial evidence to support the jury verdict.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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